No. 02-1606

Supreme Court, U.S.
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In The
Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Petitioner,

v.

PAMELA L. HOOD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF DONALD J. SPRING AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Donald J. Spring submits this brief as *amicus curiae* because the outcome of this case is important to similar issues pending in his Chapter 7 bankruptcy case before the United States Bankruptcy Court for the District of Massachusetts (Chapter 7 Case No. 02-19005).[1]

Mr. Spring commenced his Chapter 7 case in December 2002 with a principal purpose of seeking a discharge of his government student loan debts. In April of this year, the bankruptcy court granted a "general discharge" of Mr. Spring's debts pursuant to 11 U.S.C. § 727. However, by operation of 11 U.S.C. § 523(a)(8), the bankruptcy court's general discharge did not apply to Mr. Spring's government student loans. Therefore, Mr. Spring filed an action in the bankruptcy court seeking a separate order of discharge for his government student loans on the basis of "undue hardship" (Adversary Proceeding No. 03-01116). The University of Massachusetts, one of Mr. Spring's student loan creditors and a defendant in the "undue hardship" discharge action, filed a motion to dismiss Mr. Spring's complaint on Eleventh Amendment sovereign immunity grounds.

Last month, the bankruptcy court entered an order denying the University's motion to dismiss for the same reason articulated in the opinion of the United States Court of Appeals for the Sixth Circuit in this case – that,

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[1] Hale and Dorr LLP represents Mr. Spring on a *pro bono* basis, both in this case and in his Chapter 7 bankruptcy case, and Hale and Dorr LLP, in its capacity as *pro bono* counsel, has paid all costs of submitting this brief. No other person or entity has made a monetary contribution to the preparation or submission of this brief. Counsel for Mr. Spring at Hale and Dorr LLP authored this brief in whole.

by enacting 11 U.S.C. § 106, Congress validly abrogated Eleventh Amendment sovereign immunity for 11 U.S.C. § 523(a)(8) actions. The bankruptcy court stated, however, that it would entertain a motion to reconsider its order if the Court were to reverse the Sixth Circuit's decision.

Because the decision of the Court in this case has a direct and substantial effect on Mr. Spring's pending "undue hardship" discharge case against the University of Massachusetts, Mr. Spring has sought and obtained, from both the petitioner and the respondent, consent to file this *amicus curiae* brief in support of the respondent.

SUMMARY OF ARGUMENT

The primary question in this case is whether Congress has authority to abrogate sovereign immunity under the Bankruptcy Clause of the Constitution. The practical effect of this question on Chapter 7 debtors like Ms. Hood and Mr. Spring is significant. The answer to this question determines whether Ms. Hood and Mr. Spring may sue their respective government student loan creditors in federal court to obtain "undue hardship" discharges under 11 U.S.C. § 523(a)(8).

The petitioner and *amici curiae* in support of the petitioner have attempted to de-emphasize the importance of this case for Chapter 7 debtors by suggesting various alternatives to "undue hardship" suits by debtors against state creditors in federal court. These alternatives fall into four categories: state court suits, *Ex parte Young* suits, suits by the federal government against states, and non-judicial options.

In this brief, Mr. Spring will demonstrate that the alternatives suggested by petitioner and other *amici* are not satisfactory to Chapter 7 debtors like Ms. Hood and Mr. Spring. For the most part, these alternatives fail to offer the timely, certain, and full relief from government student loan debts that an "undue hardship" discharge promises. Further, Mr. Spring will demonstrate that the alternatives suggested by the petitioner and other *amici* may not be available to Chapter 7 debtors like Ms. Hood and Mr. Spring. For jurisdictional, factual, and practical reasons, most or all Chapter 7 debtors may be denied access to the avenues of relief suggested by the petitioner and other *amici*.

Mr. Spring submits that there is no meaningful alternative to an "undue hardship" discharge granted by a federal court. Accordingly, the suggestions for alternative relief made by the petitioner and other *amici* cannot provide a basis for the Court to reverse or vacate the decision of the Sixth Circuit below. Mr. Spring requests that the Court affirm the Sixth Circuit's decision and preserve what may be his and Ms. Hood's only means for adequate relief from their respective government student loans.

ARGUMENT

There is no meaningful alternative to an "undue hardship" action by a debtor against a state creditor in federal court

The petitioner and *amici curiae* in support of the petitioner have suggested four alternatives to "undue hardship" suits by debtors against states in federal court.

The petitioner and other *amici* assert that these alternatives properly and adequately protect the interests of Chapter 7 debtors, such that suits against state creditors for "undue hardship" discharges are not required.

First, petitioner and other *amici* have suggested that a Chapter 7 debtor may wait for a state creditor to collect a student loan in state court and may raise an "undue hardship" defense at that time. Second, petitioner and other *amici* have suggested that a Chapter 7 debtor may file an action against state officials in federal court under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Third, petitioner and other amici have suggested that a Chapter 7 debtor may wait for the federal government to sue the state creditor in federal court. Fourth, petitioner and other amici have suggested that a Chapter 7 debtor may pursue non-judicial options for debt relief through administrative agencies.

Mr. Spring agrees that most of these suggested alternatives avoid the Eleventh Amendment sovereign immunity issues confronted in a debtor's "undue hardship" action against a state in federal court. However, the suggested alternatives are only valuable to Chapter 7 debtors – and to the Court as it attempts to resolve this case – if the alternatives can provide relief similar to that of an "undue hardship" bankruptcy discharge. Disappointingly, they cannot. The suggested alternatives either fail to offer debtors satisfactory relief, are not generally available to debtors, or both.

A. State Court Suits

In its brief, the petitioner states, "The appropriate and fully adequate remedy for a debtor seeking discharge under 11 U.S.C. § 523(a)(8) is to raise the issue of 'undue hardship' as a defense to any collection action that might

be brought by the state creditor in state court." (Pet'r Br. at 30). Although the Eleventh Amendment is applicable to suits in both federal and state court, a state creditor commencing a collection action in state court would waive any sovereign immunity available to it under state or federal law. *See Alden v. Maine*, 527 U.S. 706 (1999) (holding Eleventh Amendment sovereign immunity extends to suits against states in state court involving federal law claims). Thus, a state court collection action does not implicate the Eleventh Amendment concerns that have engendered the dispute in this case.[2] However, contrary to the petitioner's assertions, the suggested state court alternative is neither appropriate nor adequate. In fact, relief under this alternative is unsatisfactory and may not even be available.

First, the state court alternative is unsatisfactory because it forces a debtor to rely upon the action of a state creditor to resolve the debtor's financial affairs. A debtor cannot obtain the "fresh start" promised by bankruptcy if he or she must live under the shadow of a potential state court collection action. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (stating that one of the primary purposes of bankruptcy is to provide a debtor with "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt"). Whether a government student loan debt is discharged or not may be a material factor in a debtor's post-bankruptcy financial plan and will likely affect a

[2] On the other hand, under the Court's decision in *Alden*, Eleventh Amendment concerns would be raised if a debtor initiated an action in state court seeking a discharge of his or her government student loans pursuant to 11 U.S.C. § 523(a)(8).

debtor's future financial and nonfinancial decisions. For example, Mr. Spring has plans for employment retraining, which he will be more likely to pursue if the debts relating to his past educational experiences are discharged. In addition, a state creditor may collect government student loans without initiating a state court collection action. Mr. Spring's federal and state tax refunds have in the past been offset against his government student loan debts, and Mr. Spring believes that these offsets will continue to the extent that he is entitled to future tax refunds. Thus, a debtor like Mr. Spring may never have an opportunity to raise an "undue hardship" defense in state court, making the suggested state court remedy impossible. Accordingly, a passive "wait and see" approach is far inferior to a timely grant (or denial) of discharge.[3]

Second, Mr. Spring submits that a state court does not have jurisdiction to grant the type of relief that a debtor would request in a state court collection action. As described in more detail in the following paragraphs, only federal courts have the power to grant a bankruptcy discharge. Since a determination of "undue hardship"

[3] It is also possible that a debtor may lose his or her ability to assert an "undue hardship" defense because of events occurring in a state court collection action. If a state creditor sues to collect in state court and a debtor fails to respond, or responds without raising an "undue hardship" defense, and if a state court is held to have concurrent jurisdiction over "undue hardship" discharge, then a debtor may be collaterally estopped from later seeking a discharge of that debt. *See Rosenbaum v. Cummings (In re Rosenbaum)*, 150 B.R. 994, 997 (E.D. Tenn. 1993). Debtors suffering from "undue hardship" may have unstable residential arrangements, health problems, and a lack of resources to hire counsel, making this result more likely than for average litigants.

involves a grant of a discharge, that determination is within the exclusive jurisdiction of the federal courts and is not within the concurrent jurisdiction of state courts. Therefore, state courts are without jurisdiction to provide the debtor with the alternative relief suggested by the petitioner and other amici.

Federal courts have exclusive jurisdiction over the grant of a bankruptcy discharge.

Pursuant to 28 U.S.C. § 1334(a) and (b), federal courts have exclusive jurisdiction over "all cases under title 11" and concurrent jurisdiction with state courts over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." This distinction separates the primary aspects of bankruptcy – the filing of a petition and the grant of a discharge – from all other aspects of bankruptcy.[4] *See Pavelich v. McCormick, Barstow, Sheppard, Wayne & Carruth LLP (In re Pavelich)*, 229 B.R. 777, 783 (BAP 9th Cir. 1999) ("[T]he types of matters

[4] Cases interpreting the language "cases under title 11" in 28 U.S.C. § 1334(a) have concluded that a "case" is the bankruptcy petition filed under the applicable chapter of title 11. *See, e.g., Poplar Run Five Ltd. P'ship v. Virginia Elec. & Power Co. (In re Poplar Run Five Ltd. P'ship)*, 192 B.R. 848, 855 (Bankr. E.D. Va. 1995). For Ms. Hood and Mr. Spring, the "case" is the voluntary petition for relief under Chapter 7 of title 11 filed by each debtor pursuant to 11 U.S.C. § 301. A Chapter 7 petition is, under modern procedure, manifested by Official Bankruptcy Form 1, in which a debtor states that he or she "requests relief in accordance with the chapter of title 11, United States Code, specified in this petition." A "petition for relief" under Chapter 7 is, in essence, a "petition for discharge," and this "petition for discharge" language has been used to describe bankruptcy cases throughout the history of federal bankruptcy law. *See, e.g., Nelson v. Carland*, 42 U.S. 265, 266 (1843); *In re D'Agnese*, 86 F.3d 732, 733 (7th Cir. 1996).

that must fall under the exclusive jurisdiction of the bankruptcy court ... include discharges."); *Warren v. Calania Corp.*, 178 B.R. 279, 281 (M.D. Fla. 1995) ("The issuance of a bankruptcy discharge is a matter within exclusive federal jurisdiction."). A debtor may file a Chapter 7 bankruptcy petition only in federal court, and only a federal court may grant a debtor a discharge.

This is not to say that state courts have no concurrent jurisdiction over matters related to discharge. "[W]hile the *grant* of a discharge in bankruptcy is the function of the bankruptcy court alone, the *effect* of the discharge can be determined by any court where it is properly raised." *In re Marriage of Letsinger*, 748 N.E.2d 812, 818 (Ill. App. 2001) (emphasis added). This principle of bifurcated jurisdiction has existed throughout the history of federal bankruptcy law in the United States.[5] *See In re Setzler*, 73 F. Supp. 314, 316 (S.D. Cal. 1947) ("As a general rule, 'the *granting* of a discharge is the function of the bankruptcy court alone, but its *effect* is for any court in which it is duly pleaded or otherwise submitted for judgment.'") (internal citations omitted) (emphasis added).

[5] The principle of bifurcated jurisdiction is codified both in 28 U.S.C. §§ 1334(a) and (b) and in 28 U.S.C. § 157(b). 28 U.S.C. § 157(b) identifies a number of "core" proceedings that "arise in" or "arise under" title 11 (the same language used to describe the scope of concurrent jurisdiction in 28 U.S.C. § 1334(b)). These "core" proceedings include "determinations as to the dischargeability of particular debts." 28 U.S.C. § 157(b)(2)(I). Indeed, state courts have concurrent jurisdiction to determine whether a particular debt was "dischargeable," *i.e.*, whether a discharge granted in federal court *applies* to that debt. This concurrent jurisdiction should be distinguished, however, from the federal courts' exclusive jurisdiction over the *grant* of a discharge.

Government student loans are not part of a general discharge under 11 U.S.C. § 727.

A Chapter 7 debtor like Ms. Hood or Mr. Spring often receives a "general discharge" at the conclusion of his or her bankruptcy case pursuant to 11 U.S.C. § 727. This general discharge applies to all debts except those specifically carved out of the general discharge by 11 U.S.C. § 523. Debts "for an educational benefit overpayment or loan made ... by a government unit, or made under any program funded in whole or in part by a government unit" are excluded from the general discharge pursuant to 11 U.S.C. § 523(a)(8).[6]

The exclusion of government student loans from the general discharge has meaningful implications to a debtor in the post-bankruptcy period. Because no discharge has been granted with respect to those loans, the "discharge injunction" contained in 11 U.S.C. § 524 does not bar a lender's collection efforts, such as the commencement or continuation of court proceedings.[7] *See Stone v. Vanderbilt Univ. (In re Stone)*, 180 B.R. 499, 501 (Bankr. M.D. Tenn. 1995) ("The predicate for a violation of the discharge injunction in § 524 is a discharged debt with respect to which collection action has been taken. A [general] discharge under chapter 7 does not discharge an individual

[6] Throughout this brief, the term "government student loans" is used to describe debts within this 11 U.S.C. § 523(a)(8) description.

[7] 11 U.S.C. § 524(a)(2) states, "A discharge in a case under this title ... operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor ...."

debtor of any student loan described in 11 U.S.C. § 523(a)(8).").

Indeed, by suggesting that Ms. Hood await a state court collection action before raising her "undue hardship" defense against the petitioner, the petitioner implies that it could file a collection action without being bound by the discharge injunction presently in force with respect to most of Ms. Hood's debts. The petitioner's position that it is not presently bound by the discharge injunction is supported by decisions in which courts refuse to apply the *Ex parte Young* doctrine to government student loan discharge actions. In these *Ex parte Young* decisions, courts generally hold that the discharge injunction cannot form the basis for an "ongoing violation of federal law" with respect to government student loan debts, because the general discharge does not apply to those debts. *See, e.g., Jordon v. Norfolk State Univ. (In re Jordon)*, 275 B.R. 755, 761 (Bankr. W.D. Va. 2002); *Stout v. United States Dept. of Educ. (In re Stout)*, 231 B.R 313, 316 (Bankr. W.D. Mo. 1999).[8] These courts reason that without a discharge,

[8] It bears mention that in *Ex parte Young* cases such as *Jordon* and *Stout* courts often issue *dicta* suggesting that a state court does have the power to determine "undue hardship" and effect a discharge of government student loans. These courts do not analyze the issues discussed in this brief. Specifically, these courts do not consider whether a state court has jurisdiction to grant a discharge. It appears, in the area of "undue hardship" cases against states, that courts often deny the requested form of relief and "pass the buck" to an alternative type of relief, without examining in detail whether the alternative relief is available. When asked to allow a debtor to proceed against a state under 11 U.S.C. § 106, courts have often found 11 U.S.C. § 106 unconstitutional, but have in *dicta* recommended that the debtor proceed under the *Ex parte Young* doctrine. *See, e.g., Kahl v. Texas Higher Educ. Coordinating Bd. (In re Kahl)*, 240 B.R. 524, 536 (Bankr.

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there can be no "ongoing violation" of the discharge injunction, and without an "ongoing violation" of the discharge injunction, there can be no *Ex parte Young* action. The predicate for these decisions is the determination that government student loans are not part of the general discharge.

An "undue hardship" finding involves a grant of a discharge.

Although government student loans are not part of the general discharge, debtors are able under 11 U.S.C. § 523(a)(8) to seek a specific discharge of these debts on "undue hardship" grounds. It is this specific "undue hardship" discharge that Ms. Hood and Mr. Spring have sought to obtain relief from their respective government student loans.

A determination of "undue hardship" is unlike any other determination under 11 U.S.C. § 523(a). For debts within the scope of certain 11 U.S.C. § 523(a) subsections, namely 11 U.S.C. § 523(a)(2), (4), (6), and (15), a creditor must act in the bankruptcy court within a specified time period in order to except the debts from the general discharge. *See* 11 U.S.C. § 523(c); FED. R. BANKR. P. 4007(c). Because creditor action must occur as a part of the general discharge process, all determinations under 11

E.D. Pa. 1999). When asked to allow a debtor to proceed against state officials under the *Ex parte Young* doctrine, courts have often found the doctrine inapplicable, but have in *dicta* recommended raising an "undue hardship" defense in state court. *See, e.g., Stout*, 231 B.R. at 317. Yet, a state court alternative is also untenable for the practical and jurisdictional reasons discussed in this brief.

U.S.C. § 523(a)(2), (4), (6), and (15) are within the exclusive jurisdiction of the federal (usually bankruptcy) courts. *See* FED. R. BANK. P. 4007(c), Advisory Committee Note.

For debts covered by other 11 U.S.C. § 523(a) subsections, including the government student loans described in 11 U.S.C. § 523(a)(8), no creditor action is required. Debts within the scope of these "self-effectuating" subsections are automatically excepted from the general discharge without any request by a creditor. *See Holland v. United States Dept. of Educ. (In re Holland)*, 230 B.R. 387, 390 (Bankr. W.D. Mo. 1999). A party desiring a determination of whether a debt was covered by one of these "self-effectuating" subsections may file an action at any time, even years after the general discharge has been granted and the debtor's Chapter 7 case has been closed. *See* FED. R. BANKR. P. 4007(b). As a general matter, determinations as to whether a debt falls within one of the "self-effectuating" subsections of 11 U.S.C. § 523(a) are within the concurrent jurisdiction of federal and state courts pursuant to 28 U.S.C. § 1334(b), because they involve only the *application* of the general discharge, not the *grant* of a separate discharge. However, the structure of 11 U.S.C. § 523(a)(8) makes it unique among the "self-effectuating" subsections of 11 U.S.C. § 523(a) and places "undue hardship" determinations within the exclusive jurisdiction of the federal courts.

Among the "self-effectuating" subsections of 11 U.S.C. § 523(a), only the exception to discharge contained in 11 U.S.C. § 523(a)(8) contains an "exception to the exception."[9] Under 11 U.S.C. § 523(a)(8), a debtor who can

[9] In fact, within all of the 11 U.S.C. § 523(a) subsections, "self-effectuating" and non-"self-effectuating" subsections alike, only subsections (8) and (15) have an "exception to the exception" format.

(Continued on following page)

demonstrate "undue hardship" may apply for and receive a separate grant of discharge with respect to his or her government student loans, notwithstanding the fact that those loans were excepted from the general discharge. The existence of "undue hardship" does not itself cause otherwise undischarged government student loans to be discharged. *See United States v. McGrath*, 143 B.R. 820, 825 (D. Md. 1992); *Vermont Student Assistance Corp. v. Zeichner*, 708 A.2d 1351, 1352 (Vt. 1998) ("[S]tudent loans are not discharged automatically under § 523(a)(8)."). Rather, a debtor's proof of "undue hardship" provides a basis for a court to grant a discharge of government student loans – and only a federal court has jurisdiction to provide such a grant.

The leading test for measuring "undue hardship" underscores the idea that an "undue hardship" determination involves the grant of a separate discharge. According to the decision in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987), the grant of an "undue hardship" discharge requires, among other things, "(1) that the debtor cannot maintain, *based on current income and expenses*, a 'minimal' standard of living for herself and her dependents if forced to repay the loans," and "(2) that additional circumstances exist indicating that this *state of affairs is likely to persist* for a

See Janc v. Coordinating Bd. for Higher Educ. (In re Janc), 251 B.R. 525, 530 n.5 (Bankr. W.D. Mo. 2000). As stated above, subsection (15) is squarely within the exclusive jurisdiction of the federal courts, and subsection (8) "undue hardship" determinations belong within the exclusive jurisdiction of the federal courts as well.

significant portion of the repayment period of the student loans." (emphasis added). The determination of "undue hardship" at the time when the "undue hardship" action is pending (and for subsequent periods), not at the time a general discharge is granted, indicates that an "undue hardship" determination involves a discharge that is separate from and unrelated to the general discharge.[10]

Federal court exclusive jurisdiction over the grant of bankruptcy discharges does not infringe upon state court concurrent jurisdiction over the application of bankruptcy discharges.

Courts have recognized the concurrent jurisdiction of state courts over the application of bankruptcy discharges. *See, e.g., Siragusa v. Siragusa (In re Siragusa)*, 27 F.3d 406, 408 (9th Cir. 1994). Particularly, many courts have noted that state court concurrent jurisdiction extends to determinations of whether certain debts fall into or outside the 11 U.S.C. § 523(a) exceptions like 11 U.S.C. § 523(a)(8). *See, e.g., Arnold v. Sallie Mae Servicing Corp.*

[10] As noted above, an "undue hardship" action may be initiated at any time, even a number of years after a general discharge is granted and a Chapter 7 case is closed. *See* FED. R. BANKR. P. 4007(b). A debtor may not suffer "undue hardship" when the general discharge is granted, but may suffer "undue hardship" at a later date. A determination of "undue hardship" at the later date would require a prospective grant of discharge, but not a grant of discharge retrospective to the date of the general discharge. Moreover, the denial of an "undue hardship" discharge at an earlier date does not preclude a debtor from bringing a later action for "undue hardship" if the debtor's circumstances change. *See Lien v. United States Dept. Health and Human Servs. (In re Lien)*, 224 B.R. 431, 434 (Bankr. D. Alaska 1998) (citing *In re Sobh*, 61 B.R. 576 (E.D. Mich. 1986)).

(In re Arnold), 255 B.R. 845, 850 (Bankr. W.D. Tenn. 2000). The decisions of these courts are supported by the Advisory Committee Notes to Federal Rule of Bankruptcy Procedure 4007(b), which indicate that there is some degree of state court concurrent jurisdiction under 11 U.S.C. § 523(a)(8). However, no court appears to have considered the precise extent of the state court concurrent jurisdiction suggested by the Advisory Committee Notes. Further, no court seems to have considered whether "undue hardship" determinations require a separate and specific grant of discharge and therefore remain within the exclusive jurisdiction of federal courts. A thorough analysis of state court jurisdiction in this area indicates that federal court exclusive jurisdiction to grant bankruptcy discharges does not infringe upon or conflict with state court concurrent jurisdiction to apply bankruptcy discharges granted by federal courts.

As described above, the *grant* of a discharge in bankruptcy is a power reserved exclusively for federal courts, while the *effect* of a discharge in bankruptcy can be determined by a state or federal court. *See Setzler*, 73 F. Supp. at 316; *Letsinger*, 748 N.E.2d at 818. Under this structure, state courts have jurisdiction, for example, to determine whether a debt is for "alimony" or "child support" and is thus subject to the exception to discharge contained in 11 U.S.C. § 523(a)(5). Likewise, state courts have jurisdiction to determine whether a debt is "for an educational benefit overpayment or loan" and is thus subject to the exception to discharge contained in 11 U.S.C. § 523(a)(8). These determinations, whatever their results, cannot necessitate or effect the grant of a discharge. Instead, these determinations answer the question of whether certain debts were "in" or "out" of the general discharge in the first place. If a

debt is for child support or a government student loan, then the general discharge never applied to the debt, and no separate discharge of the debt is appropriate. If a debt is not for child support or a government student loan, then the general discharge always applied to the debt (subject to any other applicable exceptions), and no separate discharge of the debt is required.

On the other hand, "undue hardship" determinations may require the grant of a separate discharge. If a state court determines that a debtor does not suffer from "undue hardship," then the relevant government student loan debt was automatically excepted from the general discharge, and no separate discharge of the debt is appropriate. But, if a state court finds that a debtor suffers from "undue hardship," then a separate discharge of the government student loan debt is required – and cannot be granted in state court. State courts are not incapable to hear certain dischargeability claims, but a finding of "undue hardship" necessitates relief that a state court is incapable to grant. For this reason, although state courts have concurrent jurisdiction over some 11 U.S.C. § 523(a)(8) matters, the state court alternative suggested by the petitioner and other *amici* will not provide an opportunity for "undue hardship" discharge relief.

B. *Ex Parte Young* Suits

Another suggested alternative to a debtor's suit against a state in federal court is a debtor's suit against state officials in federal court under the *Ex parte Young* doctrine. (Pet'r Br. at 29). It is well established that the Eleventh Amendment is not a bar to most suits against state officials in federal court, provided that the plaintiffs

seek only prospective declaratory and injunctive relief for an ongoing violation of federal law by the state officials. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 276-77 (1997).

The *Ex parte Young* doctrine relies in part on the legal theory that acts done in violation of federal law are outside the official capacities of state employees. State officials violating federal law are acting *ultra vires*, as private individuals rather than as instruments of government. *See Clean Air Council v. Mallory*, 226 F. Supp. 2d 705, 712 (E.D. Pa. 2002) (quoting *Ex parte Young*, 209 U.S. 123 (1908)). Therefore, suits against state officials for violations of federal law are not suits against states, subject to the Eleventh Amendment, but are rather suits against individuals who are not entitled to sovereign immunity. *See id.*

If available, *Ex parte Young* relief might provide a debtor with a satisfactory alternative to an "undue hardship" suit against a state. From a technical standpoint, *Ex parte Young* relief could enjoin only specific state-official defendants from collecting a debtor's student loans. However, a declaration of "undue hardship" discharge under the *Ex parte Young* doctrine would, in practice, likely prevent collection attempts by non-defendant state officials as well.

The problem with *Ex parte Young* relief is not that it is unsatisfactory, but rather that it is not readily available. As discussed in section A above, courts have in general held that there is no "ongoing violation of federal law" to support *Ex parte Young* relief in the "undue hardship" context. *See, e.g.*, *Jordon*, 275 B.R. at 761; *Stout*, 231 B.R.

at 316; *Perkins v. Coordinating Bd. for Higher Educ. (In re Perkins)*, 228 B.R. 431, 435 (Bankr. E.D. Mo. 1998).

In bankruptcy, the discharge injunction in 11 U.S.C. § 524 makes it illegal to attempt to collect a debt that has been discharged. The converse is also true – it is not illegal, of course, to attempt to collect a debt that has not been discharged. Government student loan debts are not discharged until a separate "undue hardship" discharge is granted, and, under the rationale of the *Ex parte Young* cases, state officials are not violating the federal discharge injunction by seeking to collect loan debts like those owed by Ms. Hood and Mr. Spring.[11] Because no "ongoing violation of federal law" may be alleged with respect to non-discharged government student loans, courts in cases like *Jordon* and *Stout* have been unwilling to entertain *Ex parte Young* actions for "undue hardship" discharges. Accordingly, *Ex parte Young* relief may not be available to a debtor seeking an "undue hardship" discharge, and such relief almost certainly will not be available without vigorous debate.

C. Federal Government Suits

It has also been suggested that a federal court suit in which the federal government is the plaintiff is a viable alternative to a federal court suit by a debtor against a

[11] It is a violation of the "automatic stay" contained in 11 U.S.C. § 362 to attempt to collect any debts of a debtor prior to the grant of a "general discharge" under 11 U.S.C. § 727. However, the automatic stay terminates upon the grant of a general discharge, and thereafter a creditor may attempt to collect any debt not subject to the general discharge.

state. (Pet'r Br. at 29). It is undeniable that the federal government may sue a state in federal court, notwithstanding state sovereign immunity. *See United States v. Mississippi Dept. of Pub. Safety*, 321 F.3d 495, 499 (5th Cir. 2003). However, it is unlikely that the federal government would actually commence a suit to protect a Chapter 7 debtor in this manner, and the basis for such a suit is in any event unclear.

Each year, nearly one million cases are filed under Chapter 7 of the Bankruptcy Code. *See* 2002 UNITED STATES TRUSTEE PROGRAM, ANNUAL REPORT OF SIGNIFICANT ACCOMPLISHMENTS at 58. Many Chapter 7 debtors have outstanding government student loans, and many Chapter 7 debtors believe that they meet the "undue hardship" standard for a discharge of those loans. It is difficult to imagine a process by which the executive branch of the federal government would determine which debtors deserve federal prosecution of an "undue hardship" discharge and which debtors do not. It is also difficult to imagine the vast expenditure of public resources necessary to prosecute any significant number of "undue hardship" cases. These cases are highly individualized and fact-specific, taking into account the details of a particular debtor's life on a case-by-case basis. *See Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 302 (3d Cir. 1995). If a debtor were required to rely on federal prosecution to obtain an "undue hardship" discharge, then the chance of the debtor obtaining such a discharge would be infinitesimal.

Also, it is unclear what cause of action the federal government would bring against a state creditor in this context, and what federal agency would have standing to do so. As discussed in section B above, a state creditor may

attempt to collect a government student loan, absent the grant of an "undue hardship" discharge, without violating federal law. Thus, it would appear that the federal government cannot prosecute a state for attempting to collect government student loans like those owed by Ms. Hood and Mr. Spring. On the other hand, if the federal government were to sue a state creditor to seek an "undue hardship" discharge for a debtor, the federal government's standing might be questioned. Most federal government agencies would lack standing to pursue such an action. The Office of the United States Trustee, alone among federal agencies, may have standing to prosecute an "undue hardship" case pursuant to 11 U.S.C. § 307.[12] Yet, the United States Trustee is a supervisor of the bankruptcy process, not an advocate for the debtor.[13] Prosecution of "undue hardship" cases for debtors would be inconsistent with the United States Trustee's traditional role.

Even if a federal agency has standing to pursue an "undue hardship" action against a state creditor, the interests of the federal government would not favor – and would in fact oppose – the pursuit of a government student

[12] 11 U.S.C. § 307 states as follows: "The United States trustee may raise and appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title."

[13] *See* 28 U.S.C. § 586(a) (describing duties of the United States Trustee). *See also In re Dalen*, 259 B.R. 586, 598 n.16 (Bankr. W.D. Mich. 2001) ("Indeed, the purpose of the United States trustee program is to fill the gap left by Congress' decision to remove the bankruptcy judges from the supervisory role which they had come to accept under the Bankruptcy Act.").

loan discharge. As a lender for whom 11 U.S.C. § 523(a)(8) is a protection, the federal executive branch has an interest in keeping the "undue hardship" standard difficult to satisfy and in having most "undue hardship" discharge requests denied.[14] Thus, a federal agency is a poor ally for a Chapter 7 debtor seeking an "undue hardship" discharge, and the alternative of a federal government suit is inadequate and likely unavailable.

D. Non-Judicial Options

Certain non-judicial options have also been presented as alternatives to "undue hardship" actions against states in federal court. (Br. of Council of State Gov'ts as *Amici Curiae* Supporting Pet'r at 28-30). State and federal agencies have promulgated administrative means of deferment, forbearance, and forgiveness of government student loans to offer borrowers certain limited types of debt management. However, these non-judicial options either are inferior to a bankruptcy discharge or, even if roughly equivalent, are not available to most Chapter 7 debtors.

Deferment and forbearance are not equivalent to an "undue hardship" discharge because these options do not provide the "fresh start" conferred by an "undue hardship" discharge. The "fresh start" is "a new opportunity in life and a clear field for future effort, unhampered by the

[14] The federal government, through its Department of Education, provides $67 billion in student aid each year, which constitutes 70 percent of all student aid nationally and which assists millions of students. *See* http://www.ed.gov/finaid (last visited Dec. 16, 2003).

pressure and discouragement of pre-existing debt." *Hunt*, 292 U.S. at 244 (emphasis added). While deferment and forbearance offer temporary relief from a government student loan debt, they do not offer a "clear field for future effort" – the debtor continues to be "[ ]hampered by the pressure and discouragement" of the government student loan debt. Deferment and forbearance may be somewhat helpful to some borrowers under some circumstances, but these types of relief are far more narrow and far less helpful than a bankruptcy discharge.

Some state and federal regulations may offer permanent relief roughly equivalent to that provided by an "undue hardship" discharge. For example, federal regulations offer a discharge of a government student loan if a debtor demonstrates, among other things, that he or she is "totally and permanently disabled." 34 C.F.R. § 682.402(c). However, a "total and permanent disability" regulatory discharge is only available to a narrow subset of Chapter 7 debtors, excluding most debtors who meet Congress' "undue hardship" standard for a bankruptcy discharge.

Pursuant to the federal regulations, "totally and permanently disabled" is defined as "the condition of an individual who is unable to work and earn money because of an injury or illness that is expected to continue indefinitely or result in death." 34 C.F.R. § 682.200(b). Not only must a debtor meet this high standard, which is obviously more stringent than "undue hardship," but he or she must also wait three years after a finding of "total and permanent disability" before a government student loan debt is permanently discharged. 34 C.F.R. § 682.402(c). If at any

time during the three-year period the debtor's annual earnings exceed the poverty level for a family of two, the debt will not be discharged.[15] 34 C.F.R. § 682.402(c). Accordingly, forms of relief like a "total and permanent disability" discharge, which may be roughly equivalent to a bankruptcy discharge, are simply not available to most debtors who would nevertheless be entitled to "undue hardship" bankruptcy discharges.

CONCLUSION

Mr. Spring's case demonstrates that the alternatives suggested by the petitioner and other *amici* are not really alternatives at all. Mr. Spring would be prejudiced if he were forced to wait for the University of Massachusetts to sue him in federal court. Not only would his finances remain uncertain, but any tax refunds to which he might be entitled would likely be automatically offset against his government student loans. Even if he were sued in state court by the University, his "undue hardship" defense would fail for jurisdictional reasons or for other reasons unrelated to Mr. Spring's "undue hardship."

Mr. Spring has tried to avert the indeterminate status of his government student loans by commencing an *Ex parte Young* action against officials of the University of Massachusetts. These officials have responded with a

[15] The federal poverty level for a family of two is presently $12,120. *See* http://aspe.hhs.gov/poverty/03poverty.htm (last visited Dec. 16, 2003). For a debtor like Mr. Spring, this income level will not likely suffice to pay ordinary living expenses and to service government student loan debt.

motion to dismiss on the grounds described in section B of this brief. To date, the issue has not been resolved in Mr. Spring's case, and Mr. Spring's ability to receive an "undue hardship" discharge under the *Ex parte Young* doctrine is far from certain.

Mr. Spring could rely on a hope that the federal government will step in to sue the University of Massachusetts for his "undue hardship" discharge, but this hope would be in vain. No federal agency has indicated a willingness to pursue this type of action on behalf of Mr. Spring, and it is not certain whether such an action would be permitted. Moreover, Mr. Spring cannot be expected to rely on the nation's largest government student loan creditor to pursue a discharge of his government student loans.

The University of Massachusetts has itself suggested that Mr. Spring apply for an administrative discharge on the grounds of "total and permanent disability." However, Mr. Spring is not totally disabled. Whatever "undue hardship" means, it is something less than "total and permanent disability," and Mr. Spring believes that he is able to satisfy the former standard, even if he is not able to satisfy the latter.

Mr. Spring believes that the federal bankruptcy court should grant him an "undue hardship" discharge of his government student loans. Indeed, Mr. Spring submits that the federal courts are the only courts able to provide Mr. Spring with this relief. What is more, Mr. Spring submits that an "undue hardship" discharge is the only relief able to satisfy the principles of federal bankruptcy law to which he has turned for help. Accordingly, it is important to Mr. Spring that the Court affirm the decision

of the Court of Appeals for the Sixth Circuit below and allow him to proceed against the University of Massachusetts for an "undue hardship" discharge in federal court.

Respectfully submitted,

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